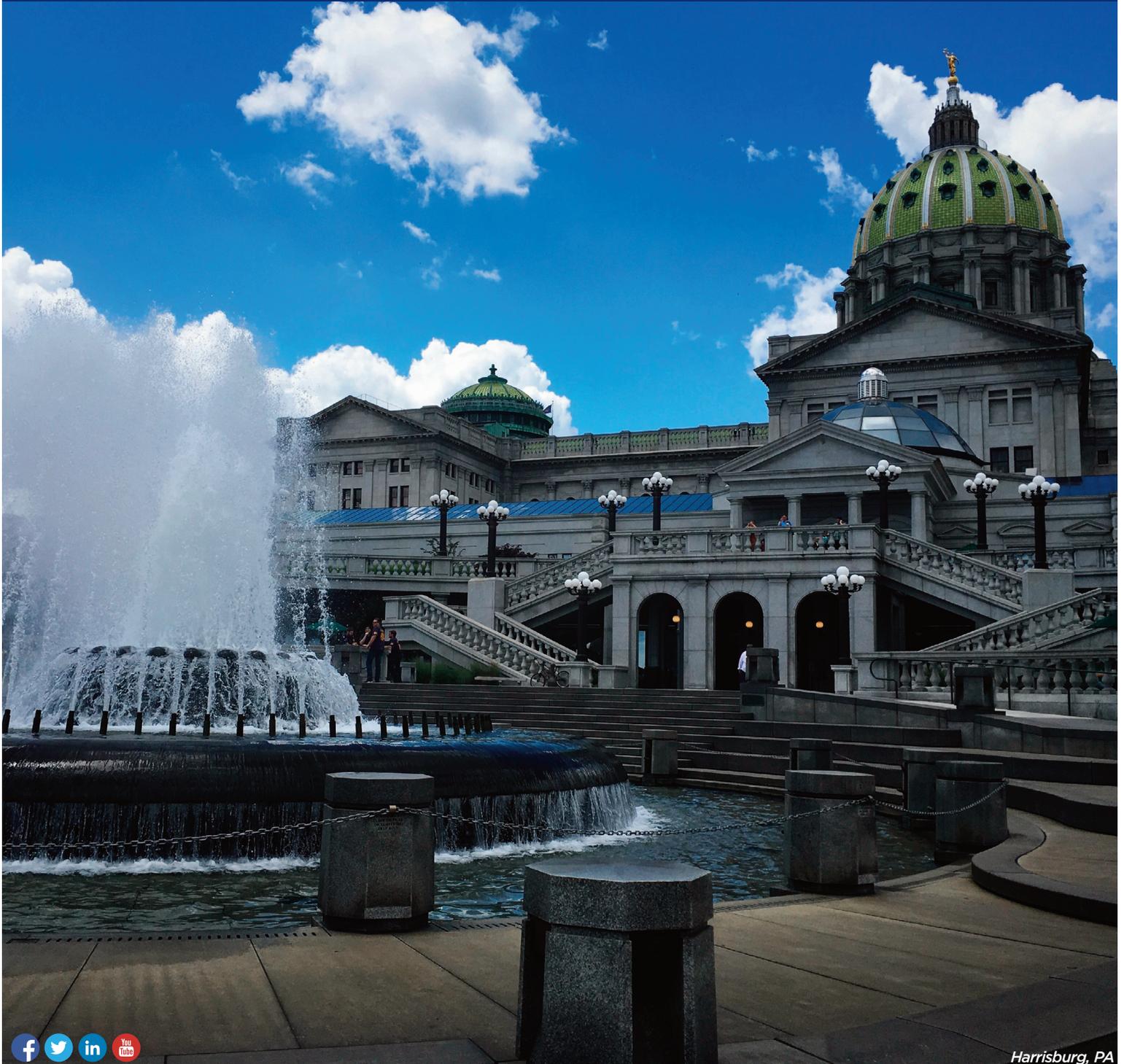


# OPEN MEETINGS THE SUNSHINE ACT

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# I. Purpose of the Sunshine Act

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When enacting the Sunshine Act, the Pennsylvania General Assembly determined that the public's right to be present at all meetings of agencies and witness the deliberative and decision making process is "vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society."<sup>1</sup> As a result, the General Assembly declared it to be the policy of the commonwealth "to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon."<sup>2</sup>

The Pennsylvania Supreme Court has held that the Sunshine Act is "designed to enhance the proper functioning of the democratic process by curtailing secrecy in public affairs."<sup>3</sup> The Sunshine Act "should be read broadly in order to accomplish its important objective of allowing the public to witness deliberations and actions of public agencies."<sup>4</sup> It should also be construed together with the Right-to-Know Law, if possible, because both statutes relate to providing information about the actions of public agencies.<sup>5</sup>

## References

1. 65 Pa.C.S.A. § 702(a).
2. 65 Pa.C.S.A. § 702(b).
3. *Smith v. Township of Richmond*, 82 A.3d 407 (Pa. 2013).
4. *Lee Publications, Inc. v. Dickinson School of Law*, 848 A.2d 178 (Pa.Cmwlt. 2004), appeal granted, 854 A.2d 969, 578 Pa. 718 (2004), review dismissed as improvidently granted, 857 A.2d 675, 579 Pa. 545 (2004).
5. *Schenck v. Township of Center, Butler County*, 893 A.2d 849 (Pa.Cmwlt. 2006), appeal granted, 918 A.2d 749, 591 Pa. 707 (2007), appeal dismissed as improvidently granted, 975 A.2d 591, 601 Pa. 548 (2009).

## II. Open Meeting Requirements

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The Sunshine Act requires that all “[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public” unless a closed meeting is otherwise permitted.<sup>1</sup>

Many of the terms above are discussed in detail below because they are critical to the determination of whether an entity is subject to the Sunshine Act and whether its actions must take place at a public meeting.

### Agencies

The Sunshine Act broadly defines an “agency” to include the governing body, and all committees authorized by the governing body to take official action or render advice on agency business, of a wide variety of state and local government entities. The General Assembly, Executive Branch (including the Governor’s cabinet when meeting on official policymaking business), and all boards, councils, authorities, and commissions of the Commonwealth are subject to the Sunshine Act. In addition, all governing boards of political subdivisions (counties, cities, boroughs, incorporated towns, townships, school districts, intermediate units, vocational school districts, or county institution districts) and any board, council, authority, or commission authorized by them are covered by the Sunshine Act. Furthermore, school boards, authorities, and commissions, as well as boards of trustees of state-aided, state-owned, and state-related colleges and universities and community colleges are subject to the Sunshine Act. Finally, the law applies to any other organization that performs an essential governmental function and through the joint action of its members exercises governmental authority and takes official action. The Sunshine Act does not apply to caucuses or ethics committee meetings of the Pennsylvania Senate or House of Representatives.<sup>2</sup>

The following is a sampling of the specific bodies and committees that have been determined to be “agencies” subject to the Sunshine Act by the Pennsylvania courts:

- Zoning hearing boards,<sup>3</sup>
- Planning commissions,<sup>4</sup>
- A school district empowerment team, because it was authorized to take official action and render advice on policies and regulations,<sup>5</sup> and
- The Philadelphia Board of License and Inspection Review, because it was created as a quasi-judicial body that performed fact-finding and deliberative functions.<sup>6</sup>

Conversely, the following have been determined not to be subject to the Sunshine Act:

- Individuals, including the Governor, and commissions that lack the authority to make binding recommendations,<sup>7</sup>
- Independent entities that have a contractual relationship with a public body,<sup>8</sup> and
- A tax increment financing committee that did not exercise governmental authority or take official action.<sup>9</sup>

Ad hoc committees or citizen advisory committees that are created for the purpose of furnishing information and recommendations to governing bodies are not subject to the Sunshine Act unless they have “actual, or de facto, decision-making authority.”<sup>10</sup>

## Meetings

A “meeting” is defined as “[a]ny prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.”

“Agency business” is the “framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise, or the adjudication of rights, duties and responsibilities,” but does not include administrative actions taken by agencies. “Official action” refers to recommendations made by an agency, the establishment of policy by an agency, decisions on agency business, and votes taken.<sup>11</sup>

Agency members may participate in meetings via telephone, provided that the members can communicate with each other and the members of the public can hear all members involved.<sup>12</sup> Although there are no known appellate-level cases dealing with participation at meetings through internet-based programs such as Skype or GoToMeeting, it is almost certain that type of participation would also be upheld by the courts.

## Deliberations

“Deliberation” means the “discussion of agency business held for the purpose of making a decision.”<sup>13</sup>

What constitutes “deliberation” by an agency has been the source of considerable controversy and litigation, in significant part because it requires a fact-sensitive inquiry. For example, the Commonwealth Court held that a township board of supervisors violated the Sunshine Act when a quorum of the board met regarding a proposed amendment to a zoning ordinance during a closed meeting after a newly appointed member of the board felt unprepared to consider the proposed change. The court found that the meeting clearly amounted to a quorum of the board deliberating regarding a pending ordinance, which constituted agency business.<sup>14</sup>

However, agencies are permitted to conduct fact-finding or information-gathering sessions, provided that those sessions involve no deliberations or official action.<sup>15</sup> In a recent case, a township took steps to educate a new supervisor and solicitor regarding pending litigation involving the possible expansion of a quarry. The board of supervisors conducted a series of gatherings with officials from neighboring townships, concerned citizens, and the quarry’s ownership. All parties involved confirmed that there were no deliberations and no official actions taken during the gatherings. In finding that the board of supervisors did not violate the Sunshine Act, the Pennsylvania Supreme Court held that “[g]atherings held solely for the purpose of collecting information or educating agency members about an issue” are not held for the purpose of making a decision, even where the information obtained during that gathering may later assist the agency in taking official action.<sup>16</sup>

In addition, zoning hearing boards are permitted to engage in “quasi-judicial deliberations” during executive sessions, which are discussed in more detail in the section, “Exceptions to Open Meeting Requirements,” in this publication.<sup>17</sup>

It is important to note that the Sunshine Act only governs the formal actions taken at public meetings, not any writings that may be issued to explain those formal actions. For example, when a zoning hearing board issued a written opinion that differed somewhat from the reasons stated by the board during the public meeting, it did not violate the Sunshine Act.<sup>18</sup>

## Administrative Action

Administrative actions taken by agencies need not comply with the Sunshine Act. Such actions are defined as the “execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency.”<sup>19</sup> In other words, once the agency takes official action at a public meeting, it may take the actions necessary to implement those official actions without doing so at future public meetings. For example, a township may be faced with the issue of whether to construct storm sewers. The deliberations regarding whether to undertake the project, the vote, and the award of the contract would all need to take place at a public meeting. However, the administrative details, such as meetings with the contractor and the scheduling of construction, could be handled outside of public meetings.

In an illustrative case, a city council failed to timely adopt a budget. Because there was no agreement between the city and the police union that the police would work without wages, the mayor furloughed the entire police force. The court ruled that the mayor had the authority as the city's chief executive to furlough the officers because he had no authority to pay wages without a budget. His actions in furloughing the police force were considered to be administrative actions.<sup>20</sup> Similarly, when a committee of the House of Representatives approved revised per diem guidelines after the full House of Representatives adopted a resolution approving a per diem increase during a public meeting, a court held that the committee's approval was an administrative action by which the committee executed the resolution adopted by the House.<sup>21</sup>

## References

1. 65 Pa.C.S.A. § 704.
2. 65 Pa.C.S.A. § 703.
3. *Kennedy v. Upper Milford Tp. Zoning Hearing Bd.*, 834 A.2d 1104, 575 Pa. 105 (2003).
4. *Moore v. Township of Raccoon*, 625 A.2d 737, 155 Pa.Cmwlt. 529 (1993).
5. *Patriot-News Co. v. Empowerment Team of Harrisburg School Dist. Members*, 763 A.2d 539 (Pa.Cmwlt. 2000).
6. *Society Hill Civic Ass'n v. Philadelphia Bd. of License & Inspection Review*, 905 A.2d 579 (Pa.Cmwlt. 2007), appeal denied, 923 A.2d 412, 592 Pa. 762 (2007).
7. *Ristau v. Casey*, 647 A.2d 642, 167 Pa.Cmwlt. 118 (1994).
8. *Lee Publications, Inc. v. Dickinson School of Law*, 848 A.2d 178 (Pa.Cmwlt. 2004), appeal granted, 854 A.2d 969, 578 Pa. 718 (2004), review dismissed as improvidently granted, 857 A.2d 675, 579 Pa. 545 (2004).
9. *Mazur v. Washington County Redevelopment Authority*, 900 A.2d 1024 (Pa.Cmwlt. 2006), appeal denied, 912 A.2d 839, 590 Pa. 671 (2006).
10. *Ristau v. Casey*, 647 A.2d 642, 167 Pa.Cmwlt. 118 (1994); *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 92 Pa.Cmwlt. 340, 500 A.2d 900 (1985), appeal granted, 510 Pa. 361 (1986), appeal dismissed, 512 Pa. 636 (1986).
11. 65 Pa.C.S.A. § 703.
12. *Babac v. Pennsylvania Milk Marketing Bd.*, 613 A.2d 551, 531 Pa. 391 (1992).
13. 65 Pa.C.S.A. § 703.
14. *Ackerman v. Upper Mt. Bethel Tp.*, 567 A.2d 1116, 130 Pa.Cmwlt. 254 (1989).
15. *Smith v. Township of Richmond*, 82 A.3d 407 (Pa. 2013); *Belle Vernon Area Concerned Citizens v. Board of Com'rs of Rostraver Tp.*, 487 A.2d 490, 87 Pa.Cmwlt. 474 (1985).
16. *Smith v. Township of Richmond*, 82 A.3d 407 (Pa. 2013).
17. *Kennedy v. Upper Milford Tp. Zoning Hearing Bd.*, 575 Pa. 105, 834 A.2d 1104 (2003).
18. *Smith v. Hanover Zoning Hearing Bd.*, 78 A.3d 1212 (Pa.Cmwlt. 2013).
19. 65 Pa.C.S.A. § 703.
20. *Fraternal Order of Police, Flood City Lodge No. 86 v. City of Johnstown*, 594 A.2d 838, 140 Pa.Cmwlt. 644 (1991).
21. *Common Cause/Pennsylvania v. Itkin*, 635 A.2d 1113, 161 Pa.Cmwlt. 15 (1993).

## III. Exceptions to Open Meeting Requirements

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There are three exceptions to the Sunshine Act's open meeting requirement: 1) executive sessions; 2) conferences; and 3) certain working sessions of boards of auditors.<sup>1</sup> Each of these exceptions is addressed in more detail below.

### Executive Sessions

Whether a gathering constitutes a lawful executive session is one of the most controversial aspects of complying with the Sunshine Act. Given that, agencies must remember that there are only six purposes for which an agency may conduct an executive session. Those purposes are set forth below.

#### 1. Personnel Matters

The Sunshine Act permits agencies to “discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining of any specific prospective or current public officer or employee employed or appointed by the agency, or former public officer or employee” in executive sessions. However, if an individual's rights may be adversely affected, the individual may make a written request that the matter be discussed at an open meeting.<sup>2</sup>

For example, agencies may discuss employee discipline during executive sessions.<sup>3</sup> But, discussions regarding the termination of contracts with third-party consultants must be public because consultants are not a “public officer or employee.”<sup>4</sup>

While discussions on employment-related matters may take place in executive sessions, final votes must still take place at public meetings. Final votes are those that commit an agency to a course of action. For example, where an agency met in executive session and narrowed the field of candidates from five to three and then again from three to one, it did not violate the Sunshine Act because it then took the final vote to select the chosen candidate during a public meeting.<sup>5</sup> In contrast, where a school district failed to make a public vote to grant a raise to its superintendent, instead taking the action during an executive session, it violated the Sunshine Act.<sup>6</sup>

In another case, a teacher involved in disciplinary proceedings requested that those proceedings take place in private. The school board agreed and then negotiated an agreement with the teacher during a private meeting and adopted a motion to suspend her during a subsequent public meeting. A newspaper alleged that the school board violated the Sunshine Act by executing the agreement in private and not disclosing the basis for its decision during the public meeting. The court held that no violation occurred and that in certain instances the public's right to know must be balanced with an individual's right to confidentiality concerning a disciplinary matter.<sup>7</sup>

#### 2. Collective Bargaining Agreements and Labor Relations

Agencies may hold “information, strategy and negotiation sessions relating to the negotiation or arbitration of a collective bargaining agreement or, in the absence of a collective bargaining unit, related to labor relations and arbitration generally” outside of public meetings.<sup>8</sup> That is because, as the Commonwealth Court held, it was “never the purpose of the Sunshine Act to compel negotiations of labor contracts in the open.”<sup>9</sup>

A county was found not to have violated the Sunshine Act when it decided in executive session to close a county-run nursing home because the issue was a matter that clearly affected the nursing home staff and was thus a matter appropriate for collective bargaining.<sup>10</sup>

#### 3. Purchases and Leases of Real Property

Agencies may conduct executive sessions to consider the purchase or lease of real property, including, but not limited to, the purchase or lease price and other relevant terms. This ability ceases once an option to purchase or lease the property is obtained or once an agreement is obtained, if it was obtained directly without an option.<sup>11</sup> Conducting these deliberations in executive sessions assists agencies because they are not required to disclose their negotiation strategy.

#### 4. Consulting with Attorneys/Advisers Regarding Litigation Strategy

An agency may use executive sessions to “consult with its attorney or other professional adviser regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.”<sup>12</sup> The courts have made clear that executive sessions to discuss litigation matters are appropriate under the Sunshine Act “because if knowledge of litigation strategy, the amount of settlement offers or of potential claims became public, it would damage the municipality’s ability to settle or defend those matters and all the citizens would bear the cost of that disclosure.”<sup>13</sup> This section covers those private consultations between the agency and its counsel or advisers regarding litigation strategy.<sup>14</sup> “The public would be better served when the governing body can have private discussions regarding litigation.”<sup>15</sup>

However, once an agency admits a third party, the executive session exception no longer applies. For example, the Commonwealth Court found a school district in violation of the Sunshine Act because it permitted the opposing party in litigation to participate in what it called an executive session. The presence of the third party destroyed the confidentiality of the communications between the school board and its solicitor and made the meeting inappropriate for an executive session.<sup>16</sup>

#### 5. Privileged and Confidential Business

Agencies may conduct executive sessions to “review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations or possible or certain violations of the law and quasi-judicial deliberations.”<sup>17</sup>

There are numerous examples of situations where agencies would necessarily disclose privileged or confidential information if they discussed a matter outside of an executive session. For example, a school board may have an executive session with its superintendent to discuss the possible suspension of a student.<sup>18</sup>

Agencies may also conduct quasi-judicial deliberations in executive sessions. A classic example would be a zoning hearing board, which is characterized predominantly by judicial characteristics and functions. The courts have noted that zoning hearing boards must sometimes choose between unpalatable alternatives and deliberate over matters so charged with emotion that deliberations “must be cloaked with the protection of privacy.”<sup>19</sup> Likewise, the Pennsylvania Gaming Control Board was permitted to consider applications for slot machine licenses during an executive session because those considerations were quasi-judicial deliberations.<sup>20</sup>

#### 6. Academic Admissions or Standing

Committees of a board or council of trustees of a state-owned, state-aided, or state-related college or university or community college or of the Board of Governors of the State System of Higher Education may use executive sessions to discuss matters of academic admission or standing.<sup>21</sup>

Agencies may only hold executive sessions during an open meeting, at the conclusion of an open meeting, or as announced for a future time. While there is no time limit on the length of an executive session, agency members must be notified of an executive session at least 24 hours in advance. Agencies must also announce the purpose of the executive session immediately before or after the executive session.<sup>22</sup> The announcement must provide meaningful information as to the purpose of the session. For example, when having an executive session to discuss litigation matters, it is not sufficient to simply announce that the agency plans to discuss litigation matters. Instead, the agency must identify the subject of the litigation.<sup>23</sup>

## Conferences

Agencies are permitted to participate in conferences that are not open to the public, provided that no deliberations take place at the conference.<sup>24</sup> A “conference” is defined in the Sunshine Act as “[a]ny training program or seminar, or any session arranged by state or federal agencies for local agencies, organized and conducted for the sole purpose of providing information to agency members on matters directly related to their official responsibilities.”<sup>25</sup> Examples of such conferences would be county or statewide conferences of municipal officials.

Agencies should also be careful not to conduct private “briefing” sessions in which agency employees inform the governing body about various issues or concerns, if the governing body engages in deliberations or takes official action during those sessions. Under the plain language of the Sunshine Act, those sessions are not “conferences” because they are not training programs or seminars or other sessions arranged by state or federal agencies.

## Working Sessions of Auditors

Boards of auditors may conduct closed working sessions for the limited purpose of examining, analyzing, discussing, and deliberating the various accounts and records for which they are responsible, so long as any official action takes place during a public meeting.<sup>26</sup>

Meetings conducted by boards or councils to discuss proposed budgets are not considered “working sessions” under the Sunshine Act and should be treated as public meetings.

## References

1. 65 Pa.C.S.A. § 707.
2. 65 Pa.C.S.A. § 708(a)(1).
3. *Mirror Printing Co., Inc. v. Altoona Area School Bd.*, 609 A.2d 917, 148 Pa.Cmwlt. 168 (1992).
4. *Easton Area Joint Sewer Authority v. The Morning Call, Inc.*, 581 A.2d 684, 135 Pa.Cmwlt. 363 (1990).
5. *The Morning Call, Inc. v. Board of School Directors of Southern Lehigh School Dist.*, 642 A.2d 619 (Pa. Cmwlt. 1994), appeal denied, 539 Pa. 698 (1994).
6. *Preston v. Saucon Valley School Dist.*, 666 A.2d 1120 (Pa.Cmwlt. 1995).
7. *Mirror Printing Co., Inc. v. Altoona Area School Dist.*, 609 A.2d 917, 148 Pa.Cmwlt. 169 (1992); 24 P.S. 11-1126 (Public School Code, Section 1126).
8. 65 Pa.C.S.A. § 708(a)(2).
9. *St. Clair Area School Dist. v. St. Clair Area Educ. Ass’n*, 552 A.2d 1133, 123 Pa.Cmwlt. 62 (1988), appeal granted, 563 A.2d 500, 522 Pa. 615 (1989), affirmed, 579 A.2d 879, 525 Pa. 236 (1990), reargument denied (1990).
10. *Lawrence County v. Brenner*, 582 A.2d 79, 135 Pa.Cmwlt. 619 (1990), appeal denied, 593 A.2d 423, 527 Pa. 652, appeal denied, 593 A.2d 426, 527 Pa. 656 (1991).
11. 65 Pa.C.S.A. § 708(a)(3).
12. 65 Pa.C.S.A. § 708(a)(4).
13. *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 156 Pa.Cmwlt. 412 (1993).
14. *Trib Total Media, Inc. v. Highlands School Dist.*, 3 A.3d 695 (Pa.Cmwlt. 2010), appeal denied, 24 A.3d 865, 611 Pa. 648 (2011).
15. *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 156 Pa.Cmwlt. 412 (1993).
16. *Trib Total Media, Inc. v. Highlands School Dist.*, 3 A.3d 695 (Pa.Cmwlt. 2010), appeal denied, 611 Pa. 648 (2011).
17. 65 Pa.C.S.A. § 708(a)(5).
18. *Picone v. Bangor Area School Dist.*, 936 A.2d 556 (Pa.Cmwlt. 2007).
19. *Kennedy v. Upper Milford Tp. Zoning Hearing Bd.*, 575 Pa. 105 (2003).
20. *Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Bd.*, 926 A.2d 926, 592 Pa. 505 (2007).
21. 65 Pa.C.S.A. § 708(a)(6).
22. *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305 (Pa.Cmwlt. 1993).
23. *Butler v. Indian Lake Borough*, 14 A.3d 185 (Pa.Cmwlt. 2011); *Trib Total Media, Inc. v. Highlands School Dist.*, 3 A.3d 695 (Pa.Cmwlt. 2010), appeal denied, 24 A.3d 865, 611 Pa. 648 (2011).
24. 65 Pa.C.S.A. § 707(b).
25. 65 Pa.C.S.A. § 703.
26. 65 Pa.C.S.A. § 707(c).

## IV. Public Notice

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The Sunshine Act establishes a right in members of the public to attend all meetings of agencies in which any agency business is discussed or acted upon. To advance that right, agencies are required to notify the public of their meetings.<sup>1</sup>

In order to comply with that “public notice” requirement, agencies must publish notice of the place, date, and time of the meeting in a newspaper of general circulation in the political subdivision where the meeting will take place or in a newspaper that has a larger paid circulation than every newspaper published in the political subdivision. Agencies must also post a notice of the place, date, and time of the meeting at their principal office or at the public building where the meeting will take place.<sup>2</sup> Agencies must provide the notice sufficiently in advance of the meeting for the notice to be published or circulated within the political subdivision where (1) the principal office of the agency is located; or (2) the meeting will occur.<sup>3</sup>

In addition, agencies must also provide copies of the public notice, upon request, to any newspaper of general circulation in the political subdivision where the meeting will be held, any radio or television station which regularly broadcasts into the political subdivision, and any interested party, provided that they provide a self-addressed, stamped envelope to the agency prior to the meeting.<sup>4</sup>

Agencies must provide public notice of their first regular meeting of each year not less than three days in advance of the meeting and the schedule for their remaining regular meetings. They must provide public notice at least 24 hours before each special meeting or rescheduled regular or special meeting. There are no public notice requirements for emergency meetings, but those meetings must still be open to the public to comply with the Sunshine Act.<sup>5</sup> Emergency meetings must involve a real or potential emergency involving a clear and present danger to life or property, such as a natural disaster.<sup>6</sup> For example, a court found that a school district’s action to adopt a redistricting plan was not worthy of an emergency meeting, but determined that no one was harmed by the district’s lack of compliance.<sup>7</sup>

In the event that an agency recesses or reconvenes a meeting, it must post a notice of the place, date, and time of the meeting at its principal office or at the public building where the meeting will take place.<sup>8</sup>

Notices need not contain a statement of the purpose of the meeting or a description of the business that will be conducted at the meeting.<sup>9</sup> Nonetheless, it is common practice to provide that information, especially in the context of special meetings, such as those that are called to discuss or adopt an agency budget or make significant changes in land uses. But, professional licensing boards within the Pennsylvania Department of State must list each matter involving a proposal to revoke, suspend, or restrict a license.<sup>10</sup>

There is also no requirement that agencies provide notice of the cancelation of public meetings. However, such notice is highly recommended as a courtesy to those citizens who planned to attend the meeting.

Additionally, agencies must provide public notice of meeting agendas. The agendas must include a listing of each matter of agency business that will be or may be the subject of deliberation or official action at the meeting. Public notice of the agenda must be given in the following manner:

1. The agenda must be posted on the agency’s website 24 hours in advance of the meeting if the agency has a publicly accessible website;
2. The agenda must be posted at the location of the meeting and the principal office of the agency; and
3. Copies of the agenda must be made available to individuals in attendance at the meeting.

The requirement to post meeting agendas does not apply to Conferences or Executive Sessions.<sup>11</sup>

An agency may not take official action on a matter of agency business at a meeting if the matter was not included in the notification of the agenda except under the following conditions:

1. **Emergency Business.** An agency may take official action at a regularly scheduled meeting or an emergency meeting on a matter of agency business relating to a real or potential emergency involving a clear and present danger to life or property regardless of whether public notice was given for the meeting.
2. **Business arising withing 24 hours before the meeting.** An agency may take official action on a matter of agency business that is not listed on a meeting agenda if: (1) the matter arises or is brought to the attention of the agency within the 24-hour period prior to the meeting; and (2) the matter is de minimis in nature and does not involve the expenditure of funds or entering into a contract or agreement by the agency.
3. **Business arising during the meeting.** If, during the conduct of a meeting, a resident or taxpayer brings a matter of agency business that is not listed on the meeting agenda to the attention of the agency, the agency may take official action to refer the matter to staff, if applicable, for the purpose of researching the matter for inclusion on the agenda of a future meeting, or, if the matter is de minimis in nature and does not involve the expenditure of funds or entering into a contract or agreement, the agency may take official action on the matter.<sup>12</sup>

Changes to the agenda:

1. An agency may add a matter of agency business to the agenda upon a majority vote of the individuals present and voting during the meeting. The reasons for the change to the agenda must be announced at the meeting before any vote is conducted on the change to the agenda. The agency must post the amended agenda on the agency's publicly available website, if one exists, and at the agency's principal office no later than the first business day following the meeting at which the agenda was changed.
2. If action is taken upon a matter of agency business added to the agenda during the meeting, the minutes of the meeting must reflect the substance of the matter added, the vote on the addition and the announced reasons for the addition.
3. The rules related to adding matters to an agenda during a meeting do not apply to Conference or Executive Sessions.<sup>13</sup>

**Meetings of the General Assembly in the Capitol Complex.** In case of sessions of the General Assembly, all meetings of legislative committees held within the Capitol Complex where bills are considered, including conference committee, all legislative hearings held within the Capitol Complex where testimony is taken and all meetings of legislative commissions held within the Capitol Complex, public notice must be provided no later than the preceding day. The supervisor of the newsroom must be provided with a minimum of 30 copies of the notice, which includes the date, time, and place of each session, meeting or hearing, to distribute to the members of the Pennsylvania Legislative Correspondents Association. The notice may also be provided via electronic means to an email address designated by the Pennsylvania Legislative Correspondents Association. Additionally, the notice must be posted either at public places within the main Capitol building designated by the Secretary of the Senate and the Chief Clerk of the House of Representatives or posted on the publicly accessible website of the General Assembly.<sup>14</sup>

## References

1. *Borough of East McKeesport v. Special/Temporary Civil Service Com'n of Borough of East McKeesport*, 942 A.2d 274 (Pa.Cmwlt. 2008).
2. 65 Pa.C.S.A. § 703.
3. 65 Pa.C.S.A. § 709(b).
4. 65 Pa.C.S.A. § 709(c).
5. 65 Pa.C.S.A. § 709(a).
6. 65 Pa.C.S.A. § 703.
7. *In re Petition of Bd. of Directors of Hazleton Area School Dist.*, 527 A.2d 1091, 107 Pa.Cmwlt. 110 (1987).
8. 65 Pa.C.S.A. § 703.
9. *Devich v. Borough of Braddock*, 602 A.2d 399, 144 Pa.Cmwlt. 578 (1992).
10. 65 Pa.C.S.A. § 709(a).
11. 65 Pa.C.S.A. § 709(c.1).
12. 65 Pa.C.S.A. § 712.1(a)-(d).
13. 65 Pa.C.S.A. § 712.1(e)-(f).
14. 65 Pa.C.S.A. § 709(d).

## V. Public Participation

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The Sunshine Act requires boards and councils of political subdivisions and authorities created by political subdivisions to provide a reasonable opportunity for residents or taxpayers to comment on matters of concern, official action, or deliberation before the board, council, or authority before they take official action.<sup>1</sup>

The board or council may elect to accept all public comments at the beginning of each meeting or immediately prior to each official action.<sup>2</sup> It may also limit comments to current business.<sup>3</sup>

In addition, if the board or council determines that there would be insufficient time for public comment at a meeting, it may defer the public comment period to the next regular meeting or a special meeting occurring in advance of the next regular meeting.<sup>4</sup>

It is also permissible to suspend a public meeting if there is an unexpected number of attendees.<sup>5</sup>

Any person, including a nonresident, has the right to object at any time at any meeting to an alleged violation of the Sunshine Act.<sup>6</sup> Agencies should be careful with respect to ejecting attendees from public meetings so as to ensure that the attendees' First Amendment rights are not violated.<sup>7</sup>

It is important to note that Section 710.1 does not explicitly apply to all "agencies" otherwise subject to the Sunshine Act, but rather only to governing boards and councils of political subdivisions and authorities created by them. Therefore, appointed commissions, boards, and committees may not need to provide an opportunity for public comment.

In addition, agencies are permitted to establish a written policy regarding public comments and establish rules and regulations for the conduct of public meetings. Among other things, they should identify when public comments will be permitted, whether any time limits on public comments will be instituted, and how they will address situations in which a large number of people wish to speak on the same topic. They can modify those rules at any time by official action.<sup>8</sup>

### References

1. 65 Pa.C.S.A. § 710.1(a).
2. 65 Pa.C.S.A. § 710.1(a).
3. *Baravordeh v. Borough Council of Prospect Park*, 706 A.2d 362 (Pa.Cmwlt. 1998), appeal denied, 725 A.2d 183, 555 Pa. 733 (1998).
4. 65 Pa.C.S.A. § 710.1(a).
5. *Sovich v. Shaughnessy*, 705 A.2d 942 (Pa.Cmwlt. 1998).
6. 65 Pa.C.S.A. § 710.1(c).
7. *Galena v. Leone*, 638 F.3d 186 (3d Cir. 2011).
8. 65 Pa.C.S.A. § 710.

## VI. Recording of Votes and Meetings

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### Recording Votes

The Sunshine Act requires each member who votes on any resolution, rule, order, regulation, ordinance, or the setting of official policy to cast their vote in a public meeting.<sup>1</sup> A “resolution” is a proposal pertaining to some matter that is presented to an official body for consideration and, if adopted by vote, becomes the agency’s formal expression of opinion or the will of the body adopted through a vote.<sup>2</sup> In addition, if the agency conducts a roll call vote, then each member’s vote must be recorded.<sup>3</sup> Secret ballots are prohibited.<sup>4</sup>

### Minutes of Meetings

Agencies are required to keep written minutes of all open meetings. Those minutes must include the following: 1) the date, time, and place of the meeting; 2) the names of the members present; 3) the substance of all official actions, and a record by individual member of the roll call votes taken; and 4) the names of all citizens who appeared officially and the subject of their testimony.<sup>5</sup>

Attendees at public meetings are permitted to take their own notes.<sup>6</sup>

### Public’s Use of Recording Equipment

The Sunshine Act grants any person attending a meeting of an agency, except the Pennsylvania Senate and House of Representatives (both of which may adopt rules governing the recording or broadcast of their sessions, meetings, and hearings), the right to record the proceedings with recording devices.<sup>7</sup> These include videotape equipment<sup>8</sup> and personal devices, such as cell phones and tablet and laptop computers.

However, agencies are permitted to adopt and enforce reasonable rules for the use of recording devices.<sup>9</sup> For example, agencies may restrict the locations from which recording devices may be used and take steps to ensure that the recordings do not disrupt meetings.

Given the existence of this right, people who attend and/or participate in public meetings must expect that they or their public comments will be recorded.<sup>10</sup> Attendees have no expectation of privacy under the Federal Wiretap Act while attending public meetings.

### References

1. 65 Pa.C.S.A. § 705.
2. *Public Opinion v. Chambersburg Area School Dist.*, 654 A.2d 284 (Pa.Cmwlt. 1995).
3. 65 Pa.C.S.A. § 705.
4. *Public Opinion v. Chambersburg Area School Dist.*, 654 A.2d 284 (Pa.Cmwlt. 1995).
5. 65 Pa.C.S.A. § 706.
6. *Commonwealth v. Swank*, 72 Pa.D.&C.2d 754 (1975).
7. 65 Pa.C.S.A. § 711.
8. *Hain v. Board of School Directors of Reading School Dist.*, 641 A.2d 661, 163 Pa.Cmwlt. 479 (1994).
9. 65 Pa.C.S.A. § 710.
10. *Harman v. Wetzel*, 766 F.Supp. 271 (E.D.Pa. 1991).

## VII. Confidentiality

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The Sunshine Act permits agencies to have closed meetings if their deliberations or official actions, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality that is otherwise protected by law, including matter related to the investigation of possible or certain violations of the law and quasi-judicial deliberations.<sup>1</sup> For example, a borough was not required to vote and adopt charges against a police chief at an open meeting because the issues giving rise to the proposed charges were under investigation by the district attorney.<sup>2</sup>

### References

1. 65 Pa.C.S.A. § 716.
2. *In re Blystone*, 600 A.2d 672, 144 Pa.Cmwlth. 27 (1991), appeal denied, 626 A.2d 1159, 534 Pa. 641 (1993).

## VIII. Violations of the Sunshine Act

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### Legal Challenges

Any party that believes that an agency has committed a violation of the Sunshine Act is permitted to file a legal challenge within either 30 days of the date of the open meeting or 30 days from the party's discovery that the alleged violation took place at a meeting that was not open. If the meeting was not open, then the challenge must be filed within one year of the date of the meeting.<sup>1</sup> The form in which a party undertakes that challenge (complaint, writ, or other means) is largely irrelevant.<sup>2</sup> The deadlines are strictly followed because the courts are exercising the power to invalidate agency procedure.<sup>3</sup>

The county courts of common pleas have original jurisdiction to hear challenges involving counties, municipalities, and other local government entities.<sup>4</sup> The Commonwealth Court has original jurisdiction to hear challenges involving state agencies.<sup>5</sup> There are no state administrative agencies that have authority to resolve alleged violations of the Sunshine Act.<sup>6</sup>

The burden of proof is upon the challenger to prove that a violation of the Sunshine Act occurred.<sup>7</sup>

### Violations and Penalties

There are numerous ways in which violations of the Sunshine Act are addressed.

First, courts may enjoin any challenged action until they make a determination as to whether the action and meeting complied with the Sunshine Act.<sup>8</sup> If the court then determines that a violation occurred, it may invalidate any actions taken at the meeting.<sup>9</sup> But, even if a violation occurred, if no harm resulted, then a court may choose not to invalidate the action.<sup>10</sup> For example, where an agency provided substantial opportunity for comment during extensive public meetings, a court refused to set aside a decision by a school board that violated the Sunshine Act.<sup>11</sup>

Second, any member of an agency who participates in a meeting with the intent and purpose of violating the Sunshine Act may be convicted of a summary offense. That member may also be subject to a fine of at least \$100 and not more than \$1,000 for a first offense and a fine of at least \$500 and not more than \$2,000 for any subsequent offense.<sup>12</sup> Agencies are prohibited from paying the fines or reimbursing members for a fine resulting from a violation of the Sunshine Act.<sup>13</sup>

Third, if a court determines that an agency willfully or wantonly disregarded any part of the Sunshine Act, then the agency will be reasonable for the challenging party's attorney fees and litigation costs. Conversely, if the court determines that a challenge was frivolous or had no substantial justification, then the agency may be entitled to its attorney fees and litigation costs.<sup>14</sup>

### Curing Violations

In the event that an agency commits a violation of the Sunshine Act, it may cure that violation by ratifying the action at a subsequent public meeting.<sup>15</sup>

It is important to note that agencies cannot use their violation of the Sunshine Act as a "sword" to later get out of unfavorable contracts or settlement agreements. In one case, a borough attempted to renege on a settlement agreement that required it to complete a water project. The court held that to allow the borough to use its own alleged violation of the Sunshine Act to avoid its contractual commitments was in violation of public policy.<sup>16</sup>

## References

1. 65 Pa.C.S.A. § 713.
2. *Tom Mistick and Sons, Inc. v. City of Pittsburgh*, 567 A.2d 1107, 130 Pa.Cmwlt. 234 (1989), appeal denied, 589 A.2d 695, 527 Pa. 606 (1990).
3. *Belitskus v. Hamlin Tp.*, 764 A.2d 669 (Pa.Cmwlt. 2000), appeal denied, 775 A.2d 809, 565 Pa. 676 (2001); *Bologna v. St. Marys Area School Bd.*, 699 A.2d 831 (Pa.Cmwlt. 1997); *Day v. Civil Service Com'n of Borough of Carlisle*, 931 A.2d 646, 593 Pa. 448 (2007).
4. 65 Pa.C.S.A. § 715; *O'Hare v. County of Northampton*, 782 A.2d 7 (Pa.Cmwlt. 2001).
5. 65 Pa.C.S.A. § 715.
6. *Com., Dept. of Environmental Resources v. Steward*, 357 A.2d 255, 24 Pa.Cmwlt. 493 (1976).
7. *Smith v. Township of Richmond*, 82 A.3d 407 (Pa. 2013); *Public Advocate v. Philadelphia Gas Com'n*, 637 A.2d 676, 161 Pa.Cmwlt. 428 (1994), appeal granted, 651 A.2d 545, 539 Pa. 660, reversed, 674 A.2d 1056, 544 Pa. 129 (1996).
8. 65 Pa.C.S.A. § 713; *Pennsylvania AFL-CIO by George v. Com.*, 683 A.2d 691 (Pa.Cmwlt. 1996).
9. 65 Pa.C.S.A. § 713.
10. *Keenheel v. Com., Pennsylvania Securities Com'n*, 579 A.2d 1358, 134 Pa.Cmwlt. 494 (1990); *Ackerman v. Upper Mt. Bethel Tp.*, 567 A.2d 1116, 130 Pa.Cmwlt. 254 (1989).
11. *Bradford Area Educ. Ass'n by Lutz v. Bradford Area School Dist.*, 572 A.2d 1314, 132 Pa.Cmwlt. 385 (1990).
12. 65 Pa.C.S.A. § 714(a); *Borough of East McKeesport v. Special/Temporary Civil Service Com'n of Borough of East McKeesport*, 942 A.2d 274 (Pa.Cmwlt. 2008).
13. 65 Pa.C.S.A. § 714(b).
14. 65 Pa.C.S.A. § 714.1.
15. *Smith v. Township of Richmond*, 82 A.3d 407 (Pa. 2013); *Kennedy v. Upper Milford Tp. Zoning Hearing Bd.*, 779 A.2d 1257 (Pa.Cmwlt. 2001), appeal granted, 813 A.2d 846, 572 Pa. 714, reversed, 834 A.2d 1104, 575 Pa. 105 (2003); *Lawrence County v. Brenner*, 582 A.2d 79, 135 Pa.Cmwlt. 619 (1990), appeal denied, 593 A.2d 423, 527 Pa. 652 (1990), appeal denied, 593 A.2d 426, 527 Pa. 656 (1990).
16. *Weest v. Borough of Wind Gap*, 621 A.2d 1074, 153 Pa.Cmwlt. 330 (1993).



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